



BAC 2210-40

UNITED STATES SENTENCING COMMISSION

Rules of Practice and Procedure

AGENCY: United States Sentencing Commission

ACTION: Notice of proposed amendments to the Sentencing Commission's Rules of Practice and Procedure. Request for public comment.

SUMMARY: This notice sets forth proposed amendments to the Commission's Rules of Practice and Procedure. The Commission invites public comment on these proposed amendments.

DATES: Public comment should be received by the Commission not later than **June 1, 2016**.

ADDRESSES: Public comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is Public_Comment@ussc.gov. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Matt Osterrieder, Legislative Specialist,

(202) 502-4500, pubaffairs@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

Section 995(a)(1) of title 28, United States Code, authorizes the Commission to establish general policies and promulgate rules and regulations as necessary for the Commission to carry out the purposes of the Sentencing Reform Act of 1984. The Commission originally adopted the Rules of Practice and Procedure in July 1997 and now proposes to make amendments to these rules. In accordance with Rule 1.2 of its Rules of Practice and Procedure, the Commission hereby invites the public to provide comment on the proposed amendments.

Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions on whether the proposed provision is appropriate.

AUTHORITY: 28 U.S.C. § 995(a)(1); USSC Rules of Practice and Procedure, Rule 1.2.

Patti B. Saris,

Chair.

1. Rules of Practice and Procedure

Synopsis of Proposed Amendment: This proposed amendment revises the Commission’s Rules of Practice and Procedure. The rules were issued in 1997 “for the purpose of more fully informing interested persons of opportunities and procedures for becoming aware of and participating in the public business of the Commission.” *See* Rule 1.1 of the Commission’s Rules of Practice and Procedure. The Commission is conducting a review of its rules to determine whether any updates or revisions are appropriate, such as to reflect current technologies, take into account practices of other rulemaking agencies and recommendations of the Administrative Conference of the United States (“ACUS”), and better promote the purpose of the rules. The Commission is publishing this proposed amendment to inform that review.

A. Actions and Meetings

This part of the proposed amendment amends Rules 2.2 and 3.3 to clarify and enumerate the types of Commission actions that are taken in public meetings, the types of actions that may be taken in nonpublic meetings or without a meeting, and the types of discussions with outside parties that may be held in nonpublic meetings. *Cf.* ACUS Recommendation 2014-2, “Government in the Sunshine Act” (adopted June 5, 2014) at ¶ 6.

Rule 2.2 identifies certain types of actions that must be taken in a public meeting and a number of other types of actions, described as “miscellaneous matters,” as actions that may be taken without a meeting. Many other types of Commission actions are not specifically enumerated. The

proposed amendment revises Rule 2.2 to clarify and enumerate the actions that must be taken in public meetings and the actions that may be taken in nonpublic meetings or without a meeting. Specifically, votes on final priorities and votes to approve or revise the minutes of public meetings must be taken at public meetings, and a number of other actions may be taken at nonpublic meetings or without a meeting. It also clarifies that the actions authorized to be taken in nonpublic meetings or without a meeting are not precluded from being taken in public meetings.

Rule 3.3 identifies the purposes for holding nonpublic meetings: to transact certain types of Commission business, to hold discussions with Commission staff, and to discuss with outside parties certain types of sensitive information. The proposed amendment revises Rule 3.3 to clarify and enumerate the purposes for holding nonpublic meetings. As revised, Rule 3.3 identifies five purposes for holding nonpublic meetings and provides more clarity and specificity about these different purposes. To summarize, they include: (1) to take action on other matters pursuant to Rule 2.2; (2) to hold discussions with Commission staff and ex officio staff; (3) to hold discussions with advisory groups, with persons within the judiciary, or with persons in the executive or legislative branches; (4) to discuss sensitive information with outside parties (with a number of examples); and (5) to hold discussions with outside experts, such as in a roundtable or symposium, on matters unrelated to the merits of any pending proposed amendment.

For nonpublic meetings covered by purpose (5), it adds that such meetings may be held under “Chatham House Rule” and may include outside observers.

Finally, it amends Rule 6.2 to delete language requiring the Office of Legislative and Public

Affairs to maintain certain information about nonpublic meetings.

B. Public Meetings and Hearings

This part of the proposed amendment amends Rules 3.2 and 3.5 to provide more information to the public about public meetings and hearings. *Cf.* ACUS Recommendation 2014-2, “Government in the Sunshine Act” (adopted June 5, 2014).

Rule 3.2 currently provides that notice of a public meeting shall be issued at least seven days prior to the date of the meeting and, where practicable, shall include an agenda and any documents approved for public release. The proposed amendment specifies that any documents approved for public release shall be posted to the website and made available by other means, “as soon as practicable” — if not before the meeting, then at the start of the meeting or in a timely manner afterward.

Rule 3.5 provides for the Commission to “tape record” public meetings and maintain a written transcription of public hearings. The proposed amendment specifies that the Commission may provide a live webcast or audiocast of its public meetings and public hearings and make the recordings available through the website.

C. Decisions on Retroactivity

This part of the proposed amendment makes substantive and clerical changes to the rules on

considering retroactivity. First, as a clerical change, it moves the provision on retroactivity from the end of Rule 4.1 to a new Rule 4.1A. Second, it changes the provision on retroactivity to state that when the Commission wishes to consider whether to make an amendment available for retroactive application, it shall publish a request for comment, make a retroactivity impact analysis available to the public, hold a public hearing, and then vote on whether to make the amendment retroactive at a public meeting at least 60 days before the effective date of the amendment.

D. Public Comment and Priorities

This part of the proposed amendment addresses issues relating to public comment on amendments, as well as the Commission's consideration of priorities.

First, Rule 4.3 addresses the public comment process for amendments to the Guidelines Manual. The proposed amendment makes two additions to Rule 4.3. The first addition provides that the Commission may divide a public comment period into an original comment phase and a reply comment phase. *Cf.* ACUS Recommendation 2011-2, "Rulemaking Comments" (adopted June 16, 2011). The second addition addresses how, if at all, the Commission considers public comment that arrives late and reply comment on issues not raised during the original comment phase, and states that such late or non-responsive comment may not be considered. *Cf.* ACUS Recommendation 2011-2, "Rulemaking Comments" (adopted June 16, 2011).

Second, Rule 5.1 identifies the Office of Legislative and Public Affairs as the repository for the Commission's public comment and public hearing testimony. The proposed amendment adds a

sentence to Rule 5.1 to provide that the public comment and public hearing testimony shall be made available to the public “through the Commission’s website” and that this shall occur “as soon as practicable after the close of the comment period.” *Cf.* ACUS Recommendation 2011-2, “Rulemaking Comments” (adopted June 16, 2011). The proposed amendment also clarifies that, where appropriate, the Commission may decline to make available public comment that is duplicative and may redact sensitive information from public comment.

Finally, the proposed amendment makes several additions to Rule 5.2 to set forth certain matters to be considered by the Commission in setting its priorities. It also establishes a new Rule 5.6 to address petitions filed by defendants under 28 U.S.C. § 994(s). *Cf.* ACUS Recommendation 2014-6, “Petitions for Rulemaking” (adopted December 5, 2014).

The first addition relates to the Commission’s responsibility under 28 U.S.C. § 994(g) to consider the impact on available penal and correctional resources. Currently, Rule 4.2 requires the Commission to consider prison impact before it promulgates an amendment. The proposal would revise Rule 5.2 to include a similar requirement that the Commission consider prison impact in setting its priorities. Relatedly, the proposal would state that, in setting its priorities, the Commission shall also consider, among other factors, the number of defendants potentially involved and the magnitude of the potential impact.

The second addition to Rule 5.2 is a set of factors to be considered by the Commission in determining which, if any, circuit conflicts to resolve. These factors were originally published by the Commission in the Federal Register in August 2000, *see* 65 FR 50034 (August 16, 2000).

The final addition to Rule 5.2 would clarify how written submissions and section 994(s) petitions relate to the priorities. Although the Commission provides a specific period each year for public comment on the priorities, suggestions about priorities have been made at other times of the year. An outside party may submit a suggestion immediately before the comment period on the priorities has opened, or long after it has closed, or during a different comment period (such as the comment period on a proposed amendment). The proposed amendment would provide for these mis-timed submissions to be carried over to the next priorities cycle and considered during that priorities cycle.

Similarly, defendants may submit petitions under section 994(s) at any time of the year. The proposed amendment would provide for section 994(s) petitions to be treated in the same way, *i.e.*, they would be carried over to the next priorities cycle and considered during that priorities cycle. In addition, the proposed amendment would establish a new Rule 5.6 for section 994(s) petitions. The new rule would incorporate section 994(s) into the Rules of Practice and Procedure and provide that the Commission will give due consideration to the petitions when it sets its priorities.

E. Input from Outside Parties; Ex Parte Communications

This part of the proposed amendment provides guidance on the Commission's practices relating to input from outside parties. *Cf.* ACUS Recommendation 2014-4, "'Ex Parte' Communications in Informal Rulemaking" (adopted June 6, 2014); ACUS Recommendation 80-6, "Intragovernmental Communications in Informal Rulemaking Proceedings" (adopted December 12, 1980). The

Commission’s practice of soliciting input from outside parties is currently contained in a single sentence at the end of Rule 5.4 (which generally relates to the Commission’s established advisory groups). It states that “the Commission expects to solicit input, from time to time, from outside groups representing the federal judiciary, prosecutors, defense attorneys, crime victims, and other interested groups.”

The proposed amendment moves this principle to a new Rule 5.5 and revises it to clarify that the Commission, individual Commissioners, and Commission staff may consult with such outside groups, and that the consultation may involve any matter affecting the Commission’s business.

In addition, the proposed amendment provides specific guidance on ex parte communications on the merits of a proposed amendment, during the pendency of the proposed amendment, from outside parties.

F. Use of Social Media Platforms

This part of the proposed amendment expands Rule 6.3, which relates to the Commission’s website and the information available there. Specifically, the proposed amendment would expand Rule 6.3 to also encompass other electronic resources offered by the Commission, including social media platforms (such as Twitter) and electronic distribution mechanisms (such as email listservs). It would add to Rule 6.3 a requirement that the Commission “use a variety of electronic means to distribute public meeting notices and provide other information about the Commission,” such as social media platforms and electronic distribution mechanisms. *Cf.* ACUS

Recommendation 2014-2, “Government in the Sunshine Act” (adopted June 5, 2014) at ¶ 3.

G. Clerical Changes

Finally, the proposed amendment makes certain clerical changes to the Rules. It provides an introductory provision about the Commission, updates the name of the Office of Legislative and Public Affairs, provides relevant statutory citations, and inserts subdivision designations to divide rules into separate parts.

Proposed Amendment:

(A) Actions and Meetings

Rule 2.2 is amended by inserting “(a)” before “Except”; by inserting “(b)” before “Promulgation”; by striking “The decision to instruct staff to prepare a retroactivity impact analysis for a proposed amendment shall require the affirmative vote of at least three members at a public meeting.” and inserting the following new paragraphs:

“ Approval of a notice of priorities shall require the affirmative vote, at a public meeting, of a majority of the members then serving.

Adoption or revision of the minutes of a public meeting shall require the affirmative vote, at a public meeting, of a majority of the members then serving.”;

by striking the paragraph that begins “Action on miscellaneous matters” and inserting the following as a new subsection:

“ (c) Action on other matters may be taken (1) at a nonpublic meeting; or (2) without a meeting by written or oral communication (*e.g.*, by “notation voting”), and shall be based on the affirmative vote of a majority of the members then serving. Such matters include the approval of budget requests, administrative and personnel issues, decisions on contracts and cooperative agreements, decisions on workshops and training programs, decisions on publishing reports and making recommendations to Congress, decisions to hold hearings and call witnesses, decisions on litigation and administrative proceedings involving the Commission, decisions relating to the formation and membership of advisory groups, the approval pursuant to 28 U.S.C. § 994(w) of a statement of reasons form, notices of proposed priorities, extensions of public comment periods, notices of proposed amendments to these rules, approval of technical and clerical amendments to these rules, and decisions to hold a nonpublic meeting. The Commission is not precluded from acting on such matters at a public meeting.”;

and by inserting “(d)” before “A motion to reconsider”.

Rule 3.3 is amended by striking “The Commission may hold” and all that follows through the period at the end and inserting the following:

“ The Chair may call nonpublic meetings for purposes of the following:

(1) To take actions on other matters (*see* Rule 2.2(c)).

(2) To receive information from, and participate in discussions with, Commission staff or any person designated by an ex officio Commissioner as support staff for that Commissioner.

(3) To receive information from, and participate in discussions with, (A) members of advisory groups; (B) interested parties within the judicial branch (*e.g.*, federal judges; the Criminal Law Committee; the Federal Public and Community Defenders); or (C) interested parties within the executive or legislative branches.

(4) Upon a decision by a majority of the members then serving, to receive or share information, from or with any other person, that is inappropriate for public disclosure (*e.g.*, classified information; privileged or confidential information; trade secrets; or information the disclosure of which would interfere with law enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, compromise a confidential source, disclose law enforcement investigative techniques and procedures, endanger the life or safety of judicial or law enforcement personnel, or be likely to significantly frustrate implementation of a proposed agency action).

(5) Upon a decision by a majority of the members then serving, to receive information from, and participate in discussions with, outside experts, on matters unrelated to the merits of any pending proposed amendment to the guidelines, policy statements, or

commentary (*e.g.*, to hold a symposium, convene an expert roundtable, or discuss local practices with a locality’s judges and practitioners). At the discretion of the Chair, such a meeting may be held under ‘Chatham House Rule.’ Subject to the discretion and control of the Chair, one or more persons may be permitted to attend such a meeting as outside observers. Where the number of outside observers is limited, the Chair may give priority to individuals referred to in subdivision (3).”

Rule 6.2 is amended in the heading by striking “Publishing” and inserting “Legislative”, and in the text by striking “Publishing” each place the term appears and inserting “Legislative”; by inserting “and” before “(5)”; and by striking “; and (6)” and all that follows through “parties.” and inserting a period.

(B) Public Meetings and Hearings

Rule 3.2 is amended by inserting after the first sentence the following: “*See* 28 U.S.C. § 993(a).”; by inserting after “approved” the following: “by the Chair”; by inserting after “public release.” the following new sentence: “The notice shall be made available to the public on the Commission’s website.”; and by inserting after that new sentence the following new paragraph:

“ Any related documents approved for public release shall be made available to the public as soon as practicable (*e.g.*, if not in advance of the meeting, then at the start of the meeting or in a timely manner after the meeting), on the Commission’s website.”.

Rule 3.5 is amended in the heading by striking “Written Record of Meetings and Hearings” and inserting “Live Webcasts and Written Records”; in the text by inserting before the first paragraph the following new paragraph:

“ To the extent practicable, and at the discretion and control of the Chair, the Commission shall provide a live webcast or audiocast of its public meetings and public hearings and shall make available a recording of the webcast or audiocast through the Commission’s website.”;

and by striking “tape record” and inserting “make an audio recording of”.

(C) Decisions on Retroactivity

Rule 4.1 is amended by inserting the following heading before the paragraph that begins “Generally,” to establish it as a new Rule 4.1A:

“Rule 4.1A – Retroactive Application of Amendments”.

Rule 4.1A (as so established) is amended by striking “, it shall decide whether to make” and all that follows through the period at the end and inserting the following: “(see 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2)), the Commission shall—

(1) at the public meeting at which it votes to promulgate the amendment, or in a timely manner thereafter, vote to publish a request for comment on whether to make the

amendment available for retroactive application;

(2) instruct staff to prepare a retroactivity impact analysis of the amendment, if practicable, and make such an analysis available in a timely manner to Congress and the public;

(3) hold a public hearing on whether to make the amendment available for retroactive application; and

(4) at a public meeting held at least 60 calendar days before the effective date of the amendment, vote on whether to make the amendment available for retroactive application.”.

(D) Public Comment and Priorities

Rule 4.3 is amended by adding at the end the following new paragraphs:

“ Where appropriate, the Commission may divide a comment period into an original comment phase and a reply comment phase. For example, the Commission may divide a comment period of 60 calendar days into an original comment phase of 40 calendar days and a reply comment phase of 20 calendar days. Comments during a reply phase are limited to issues raised in the original comment phase.

Public comment received after the close of the comment period, and reply comment received on issues not raised in the original comment phase, may not be considered.”.

Rule 5.1 is amended by striking “Publishing” and inserting “Legislative”; in the paragraph that begins “The Office” by adding at the end of the paragraph the following: “As soon as practicable after the close of the comment period (or the comment phase, as applicable), public comment and public hearing testimony shall be made available to the public through the Commission’s website.”; by striking “pursuant to a solicitation” and inserting “pursuant to or in anticipation of a request for public comment”; and by adding at the end the following new paragraph:

“ Where appropriate, the Commission may decline to make available public comment that is duplicative and may redact sensitive information from public comment.”.

Rule 5.2 is amended by inserting “(a)” before “The Commission” in the first paragraph; by striking “tentative” both places such term appears and inserting “proposed”; and by adding at the end the following new paragraphs:

“ (b) In setting its priorities, the Commission shall consider the impact of the priorities on available penal and correctional resources, and on other facilities and services. *See* 28 U.S.C. § 994(g). The Commission shall also consider, among other factors, the number of defendants potentially involved and the potential impact.

(c) The Commission’s priorities may include resolution of circuit conflicts, pursuant to the

Commission’s continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts. The Commission will consider the following non-exhaustive list of factors in deciding whether a particular guideline circuit conflict warrants resolution by the Commission:

(1) potential defendant impact;

(2) potential impact on sentencing disparity;

(3) number of court decisions involved in the conflict and variation in holdings; and

(4) ease of resolution, both as a discrete issue, and in the context of other agenda matters scheduled for consideration during the available amendment cycle.

(d) There may be circumstances in which the Commission receives — before the comment period on the next year’s priorities begins — a written submission from an outside party or a petition of a defendant under section 994(s) of title 28, United States Code (*see* Rule 5.6), that raises an issue more appropriately considered for the next year’s priorities. In such circumstances, the Commission shall consider that issue when it sets the next year’s priorities.”.

Part V is amended by adding at the end the following new Rule 5.6:

“Rule 5.6 – Petitions Filed By Defendants Under Section 994(s)

Pursuant to section 994(s) of title 28, United States Code, a defendant may file a petition with the Commission requesting a modification of the guidelines used in sentencing that defendant. To be covered by section 994(s), the petition must be on the basis of changed circumstances unrelated to the defendant, including changes in (1) the community view of the gravity of the offense; (2) the public concern generated by the offense; and (3) the deterrent effect particular sentences may have on the commission of the offense by others. *See* 28 U.S.C. § 994(s).

The Commission shall give due consideration to petitions covered by section 994(s) when it sets its priorities under Rule 5.2.”.

(E) Input from Outside Parties; “Ex Parte” Communications

Rule 5.4 is amended by striking the paragraph that begins “In addition,”.

Part V is amended by inserting after Rule 5.4 the following new Rule 5.5:

“Rule 5.5 – Outside Consultations and Ex Parte Communications

(a) From time to time, the Commission, individual Commissioners, and Commission staff may consult with outside parties representing judges, prosecutors, defense attorneys, crime

victims, and other interested parties. The consultation may involve any matter affecting the Commission's business, including matters relating to the Commission's priorities.

(b) However, during the pendency of a proposed amendment:

(1) The Commission does not intend to solicit *ex parte* communications (*i.e.*, communications outside the public comment process) on the merits of the proposed amendment from outside parties, except where it can be done in an equitable manner.

(2) Outside parties should not make unsolicited *ex parte* communications on the merits of the proposed amendment to an individual Commissioner or to the Commissioners collectively.

(3) If any communication covered by subdivision (2) is received by an individual Commissioner or the Commissioners collectively, [and the communication involves significant information or argument on the merits,] the communication shall be treated as public comment and disclosed accordingly. If it is an oral communication, a summary of the communication shall be treated as public comment and disclosed accordingly.

[(c) Subsection (b) does not apply to communications with—

(1) an *ex officio* Commissioner or any person designated by an *ex officio* Commissioner as support staff for that Commissioner;

(2) Members of Congress, congressional staff, and legislative branch agencies;

(3) the Executive Office of the President; and

(4) Justices of the Supreme Court, federal judges, and the leadership staff of the Judicial Conference of the United States or its committees.]”.

(F) Use of Social Media Platforms

Rule 6.3 is amended in the heading by inserting after “Internet Site” the following: “and Other Electronic Resources”; in the text by striking “web site” both places such term appears and inserting “website”; and by adding at the end the following new paragraph:

“ To the extent practicable, the Commission shall use a variety of electronic means to distribute public meeting notices and provide other information about the Commission. For example, the Office of Legislative and Public Affairs shall, where practicable and appropriate, use social media platforms (such as Twitter) and electronic distribution mechanisms (such as an email listserv). Information about these platforms and mechanisms shall be posted to the Commission’s website.”.

(G) Clerical Changes

The Rules of Practice and Procedure are amended by inserting before Part I the following undesignated section:

“About the Commission

The United States Sentencing Commission is an independent agency in the judicial branch of government. Its principal purposes are:

(1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes;

(2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and

(3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.”.

Rule 1.1 is amended by inserting a paragraph break before “The Commission, an agency”; by inserting after “Federal Advisory Committee Act” the following: “(5 U.S.C. App.)”; by striking “Sunshine Act” and inserting “Government in the Sunshine Act (5 U.S.C. § 552b)”; by inserting after “Freedom of Information Act” the following: “(5 U.S.C. § 552)”; and by inserting a

paragraph break before “Accordingly,”.

Rule 3.1 is amended by inserting after “meetings.” the following: “*See* 28 U.S.C. § 993(a).”.

Rule 3.4 is amended by inserting after “business.” the following: “*See* 28 U.S.C. § 995(a)(21).”.

Rule 4.2 is amended by inserting after “public.” the following: “*See* 28 U.S.C. § 994(g).”.

Rule 5.3 is amended by striking “Publishing” and inserting “Legislative”.

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